

S. 1438 - Ervin Bill

Background

1. S. 1438, the so-called invasion of privacy bill, was reintroduced in the 92nd Congress by Senator Ervin. The bill was identical to the version of the Ervin bill approved by the Senate in the 91st Congress with only partial exemptions for CIA and NSA and a complete exemption for FBI. On 21 May 1971 the Director wrote to Senator Ervin to request a complete exemption for CIA. The Agency's position was cleared with OMB. A copy of the Director's letter to Senator Ervin was also sent to Senator Eastland, the Chairman of the Judiciary Committee.

Senate Action

2. The full Senate Judiciary Committee has approved S. 1438 as introduced. This action was taken in Executive Session and the Committee report on the bill to the Senate has not been printed as of this date.

3. In the interest of verifying the facts in anticipation of the possibility of further Agency action in the Senate, contact was made this date with Senator Ervin's Constitutional Rights Subcommittee and we were informed by the staff member responsible for the bill (Marcia MacNaughton) that:

a. S. 1438 has been ordered reported out by the full Judiciary Committee and the reported out version of the bill will be available shortly.

b. The report on the bill has not yet been printed but will be available shortly.

c. The substantive comments in the report will be identical to those appearing in last year's report (S. Report 91-873) which on page three makes reference to the Director's testimony before the Subcommittee on 22 July 1969 and concludes "On the basis of this testimony and after a number of meetings of subcommittee members with officials of the Central Intelligence Agency, the National Security Agency, and the Federal Bureau of Investigation, the language contained in the committee amendments was drafted and meets with the approval of the Directors of those agencies." (underscoring supplied)

d. The report will not make reference to the Director's position concerning the need for a complete exemption as expressed in his letter to Senator Ervin of 21 May 1971. (On reflection MacNaughton realized the conflict between the Director's letter and the statement in the draft report quoted in (c) above and she said she would make an appropriate deletion.)

4. MacNaughton sees us as bearing principal responsibility for the need for legislation such as this, appears to sincerely believe that they have been accommodating to our interests and, believes that the bill as is will be favorably acted upon by the Senate and that our problem will be dealt with in conference.



CENTRAL INTELLIGENCE AGENCY

WASHINGTON, D. C. 20505

OFFICE OF THE DIRECTOR

21 May 1971

The Honorable Sam J. Ervin, Jr.
Chairman, Subcommittee on
Constitutional Rights
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

My dear Mr. Chairman:

I have noted that on 1 April 1971 you introduced S. 1438, a bill "to protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy."

When an identical bill, S. 782, was under consideration in the last Congress, you were good enough to meet with Larry Houston and Jack Maury, of my staff, to hear our explanation of some of the problems which the bill might create for us. You also gave me an opportunity to appear before your Subcommittee for the same purpose. I much appreciate your courtesy on these occasions, and I am grateful for the efforts of your Subcommittee staff to work out some changes in the original version of S. 782 designed to solve our problems.

Despite these changes our recent examination of this legislation has served only to confirm our judgment that it still falls considerably short of meeting the Agency's basic requirements. I am therefore convinced of the necessity for a complete exemption for this Agency, and I trust you will favorably consider my request for such an exemption. Larry Houston and Jack Maury are of course available at your convenience if you think further discussions would be useful.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard Helms".

Richard Helms
Director

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Section-By-Section Analysis of Certain Provisions of S. 782

Section 1 (b). Prohibits taking notice of attendance or lack of attendance at any assemblage, discussion, or lecture held or called by any officer of the Executive Branch, or by any outside parties or organizations to advise, instruct or indoctrinate any civilian employee in respect to any matter or subject other than the performance of official duties.

The purpose of this section is to protect employees from compulsion to attend meetings, discussions, and lectures on political, social, and economic subjects unrelated to his duties.

The language is so broad that it can be interpreted to prohibit a department or agency from taking notice of the attendance of an employee at meetings of subversive organizations or meetings designed to undermine the Government of the United States. Many departments and agencies, and particularly those dealing with security matters, would find such a prohibition intolerable.

Section 1 (d). Makes it unlawful to require an employee to make any report of his activities or undertakings not related to the performance of official duties unless there is reason to believe that the employee is engaged in outside activities or employment in conflict with his official duties.

The purpose of this section is to guarantee the freedom of an employee to participate in any endeavor or activity in his private life as a citizen, free of compulsion to report to supervisors his action or inaction, his involvement or his noninvolvement. It is to assure that he is free of intimidation or inhibition as a result of the employment.

This section is of primary importance to those agencies concerned with security matters which could be seriously compromised by employee activities and relationships not directly connected with his employment. Security agencies must request their employees to report contacts with foreign officials not only to give the employer notice of the relationship but also to protect the employee in his personal security should the foreign official be a member of an intelligence service. Similarly, the security agencies must request employees to submit publications and speeches for clearance in advance to insure that there is no inadvertent disclosure of intelligence information.

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Section 1'(e). Makes it unlawful to require or request any applicant or employee to submit to any interrogation or examination designed to elicit from him information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters. The section also prohibits the use of psychological testing to inquire into these same areas. These questions may be asked only on the determination by a physician that they are necessary to enable him to determine whether or not an employee is suffering from mental illness. An employee may be informed of a specific charge of sexual misconduct and afforded an opportunity to refute the charge.

A partial exemption from this subsection is provided for CIA and the NSA in section 6. These agencies may use psychological testing in the proscribed areas on the basis of a personal finding by the Directors or their designees in each individual case that the information is necessary to protect the national security.

Psychological testing in these areas is part of the total screening process which has been established to weed out applicants with undesirable traits. It is of primary concern to security agencies. The exemption provided by section 6 affords some relief, but it will still be necessary to make personal findings in each individual case. This implies that psychological screening is an exception rather than the necessary procedure in every case.

Section 1'(f). Prohibits the use of a polygraph test designed to elicit from an applicant or employee information concerning his personal relationship with any person connected with him by blood or marriage, or concerning his religious beliefs or practices or concerning his attitude or conduct with respect to sexual matters.

The purpose is not to prohibit the use of the polygraph but to prohibit its use to elicit information considered to be of a personal nature.

A partial exemption from this subsection is provided for CIA and NSA in section 6. The polygraph may be used in the proscribed areas on the basis of a personal finding by the Directors or their designees in each individual case that the test is necessary to protect the national security. As with the psychological testing, polygraph testing is of primary concern to the security agencies who have found it to be not only an invaluable supplement to field investigations but uniquely effective in detecting certain types of security vulnerabilities. It is particularly useful in uncovering undesirable characteristics which do

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not appear in field investigations. The requirement for individual findings in each case to obtain relief from this subsection implies that polygraph screening is an exception rather than a necessary procedure.

Section 1 (i). Makes it illegal to request any employee to disclose any items of his property, income, or other assets, sources of income, or liabilities. The first proviso excepts those employees who have authority to make final determination with respect to claims which require expenditure of monies of the United States. The second proviso excepts reports as may be necessary or appropriate for the determination of liabilities for taxes, tariffs, custom duties, or other obligations imposed by law.

A partial exemption for the NSA and the CIA has been granted in section 6. Financial disclosure may be requested of an employee or applicant on the basis of a personal finding by the Directors or their designees in each individual case that the information is necessary to protect the national security. The broad language used could prohibit requesting certain information from employees for such things as credit union loans, health insurance reimbursements, and other programs designed for the welfare of the employee, which are not directly related to national security and thus not covered by the partial exemption granted CIA and NSA.

Section 1 (j). Makes it illegal to request financial disclosure from those employees excepted under the first proviso of subsection (i) other than specific items tending to indicate a conflict of interest.

Full financial disclosure assists both the employee and the Government in making what at best is a difficult decision as to conflict of interest. In the absence of full disclosure, it appears that this burden is placed entirely upon the employee.

Section 1 (k). Makes it illegal to require an employee who is under investigation for misconduct to submit to interrogation which could lead to disciplinary action without the presence of counsel or other person of his choice if he so requests. In the case of NSA and CIA, counsel must be either another employee of, or approved by, the agency involved.

This right inures to the employee at the inception of the investigation and does not require that the employee be accused formally of any wrongdoing before he may request presence of counsel or friend.

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With respect to applicants, this section has most serious implications. All departments and agencies would be subject to harassment by any applicant who is not hired for the position he feels qualified to fill. For example, subversives acting on their own or on instruction from foreign agents could file suits for the sole purpose of harassment based on allegations of improper questioning during recruitment interviews.

Section 5. Establishes an independent Board on Employees' Rights to provide applicants or employees with an alternative means of obtaining administrative relief from violations of the act short of recourse of the judicial system. It creates the same potential for harassment as section 4. If the charged employee loses his case before the Board, he can still take it to the courts.

Section 6. Permits the CIA and the NSA to request employees or applicants to take a polygraph test or psychological testing designed to elicit information concerning his personal relationship to any person connected with him by blood or marriage, or concerning his religious beliefs or practices, or concerning his attitude or conduct with respect to sexual matters, or to provide a personal financial statement if the Directors, or their designees, make a personal finding with regard to each individual case that the test or information is required to protect the national security. In view of previous comments in connection with subsection 1(e) (psychological testing) and with subsection 1(f) (polygraph) this section implies that these screening aids will be used as an exception rather than the necessary procedure in every case.

Section 7. Requires an employee of CIA or NSA to give his employing agency 120 days to prevent threatened violation of the act, or redress an actual violation of the act, before proceeding before either the United States district court or the Board on Employees' Rights. This requirement for notice does not apply to CIA or NSA applicants who, along with all other Executive Branch employees and applicants, have a right to bring an action before the Board or the district court and disregard existing administrative remedies or grievance procedures.

The section reaffirms the existing statutory authority of the Director of Central Intelligence and the Director of the National Security Agency to terminate the employment of any employee. However, the potential for statutory conflict still exists should the Director terminate an employee for cause under existing statutory authority and a district court order reinstatement on a finding of a violation of the act.

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Section 8. Recognizes the statutory authority of the Director of Central Intelligence and the Director of the National Security Agency to protect or withhold certain information from unauthorized disclosure. However, information which the Director determines must be protected and not disclosed may actually provide the only basis for refuting unfounded allegations. Since the sanctions embodied in the bill run against the alleged offending employee not the Director making the determination, the net effect of withholding information to protect vital national interests is to make the charged employee bear the consequences, which can include loss of pay and even termination of employment. On the other hand, disclosure of such information with its consequential damage to the national intelligence effort is even less acceptable.

Section. 9. Grants the FBI a complete exemption from the act.

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MAJOR DEVELOPMENTS -- S. 782

90th Congress

Senate Committee: The predecessor bill, S. 1035, was reported out of Senate Judiciary Committee on 21 August 1967 (S. Rpt. 534) with full exemption from the bill for the FBI and for the CIA and NSA a partial exemption from the prohibition relating to polygraph or psychological tests and financial statements upon a personal finding by the Director concerned that such information is required to protect national security.

Senate Floor: S. 1035 passed the Senate on 13 September 1967 with amendments which (1) deleted the complete exemption for the FBI and placed it in a similar category with CIA and NSA, and (2) authorized a designee of the Director involved to make the national security finding needed to invoke the partial exemption.

House Committee: S. 1035 was referred to the Manpower and Civil Service Subcommittee of the House Post Office and Civil Service Committee, chaired by Representative David N. Henderson. The Director of Central Intelligence testified in executive session on S. 1035 and H. R. 17760, a substitute bill introduced by Chairman Henderson. The Director of Central Intelligence recommended a complete exemption from the bill for the CIA and other departments and agencies of the

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intelligence community, the same position set out in the letter to the Director of the Bureau of the Budget from the Director of Central Intelligence dated 12 October 1967. No further action was taken on either bill during the 90th Congress.

91st Congress

Senate Committee: The Director of Central Intelligence testified in executive session before the Constitutional Rights Subcommittee (chaired by Senator Ervin) of the Senate Judiciary Committee on S. 782 which was identical to S. 1035 as amended, and passed by the Senate during the 90th Congress, with specific exemptions from the provisions relating to polygraph, psychological testing and financial disclosures for CIA, NSA and the FBI. The Director of Central Intelligence restated the position that had been taken in connection with S. 1035: the need for a complete exemption. Senator Ervin opposed a complete exemption and eventually informally proposed several modifications on which he informally requested comments. These modifications were revised in keeping with some, but not all, comments made and were included as amendments in the bill as reported out on 15 May 1970 (S. Rpt. 873).

Senate Floor: S. 782 as amended was passed by the Senate on 19 May 1970, without discussion.

House Committee: S. 782 was referred to the House Post Office and Civil Service Committee on 20 May 1970 and Chairman Henderson of the Manpower and Civil Service Subcommittee requested the Agency's views.

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U.S. House of Representatives
SUBCOMMITTEE ON MANPOWER AND CIVIL SERVICE
OF THE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
Washington, D.C. 20515

May 22, 1970

Mr. Richard Helms
Director, Central Intelligence
Agency
Washington, D.C. 20505

Dear Mr. Helms:

Senate bill S. 782, a bill to protect the civilian employees of the executive branch of the United States Government in the enjoyment of their constitutional rights and to prevent unwarranted governmental invasions of their privacy, passed the Senate on May 19, 1970, and has been referred to the House Committee on Post Office and Civil Service, Subcommittee on Manpower and Civil Service.

The Subcommittee would appreciate receiving your views on this particular legislation.

With best wishes, I am

Sincerely yours,

David N. Henderson
David N. Henderson
Chairman